No. 95-1730

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

NORTHROP GRUMMAN CORPORATION and NORM BUSSARD,

Petitioners,

vs.

UNITED STATES *EX REL.* MICHAEL E. GREEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals had authority to create a federal common law rule that a private party's release of bringing a claim under the *qui tam* provisions of the False Claims Act is unenforceable unless the United States has knowledge or consents, where there is a "gap" in the False Claims Act pertaining to the enforceability of pre-filing releases without the United States' knowledge or consent.

2. Whether a purported release of a claim under the *qui tam* provisions of the False Claims Act affected the "rights and obligations of the United States" so that "uniquely federal interests" are implicated requiring a federal court to create a uniform federal common law to displace state law.

PARTIES TO THE PROCEEDING

The petitioners are incorrect when they assert that "The United States is not a party before this Court." Petition at p. ii ("Pet"). In fact, the United States is *always* a real party in interest in a lawsuit arising under the False Claims Act, even when the action was initiated by a private person pursuant to 31 U.S.C. Section 3730(b)(1). *See United States ex rel. Milam v. University of Tex. M. D. Anderson Cancer Center*, 961 F.2d 46, 50 (4th Cir. 1992). The False Claims Act mandates that an action brought by a private person under the *qui tam* provisions of the False Claims Act "shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1).

The United States was listed as a party in the underlying appeal, as well as in the district court. Moreover, presuming that the writ of certiorari is denied or that the Court of Appeal judgment is otherwise affirmed, and the respondent obtains a settlement or favorable judgment below of the claims arising under the False Claims Act, then the United States will be entitled to a substantial percentage of such a claim. *See* 31 U.S.C. § 3730(d). Because the United States is a real party in interest in the pending litigation, it must be included along with Michael Green as the respondent in this action. Fed. R. Civ. Proc. 17(a) ("Every action shall be presented in the name of the real party in interest. . . . [W]hen a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.").

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Respondent respectfully prays that the Court deny the petition for writ of certiorari filed by petitioners Northrop Grumman Corporation ("Northrop") and Norman Bussard (hereinafter collectively "petitioners") to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

Petitioners incorrectly assert that it was "undisputed" that the release executed in this case did not prevent the United States or another *qui tam* relator from pursuing a separate False Claims Act ("FCA" or "the Act") action containing the allegations made by the respondent. Pet. at 3, 22. With respect to the United States, the Court of Appeals found that to permit a pre-filing release without the United States' knowledge or consent would frustrate one of the central objectives of the FCA, namely, to provide an incentive for private persons to file suit so that the Government could learn of the fraud in the first place. App. at 17a.[1] Additionally, the Court of Appeals correctly noted that the United States would not have *learned* of the fraud alleged herein without the filing of this action. *Id.* at 19a.

Likewise, petitioners incorrectly contend that enforcement of the release would not prevent another *qui tam* plaintiff from bringing the same allegations of fraud as respondent. As recognized by the Court of Appeals, the respondent "publicly disclosed" the allegation of fraud in his wrongful termination suit in state court within the meaning of 31 U.S.C. Section 3730(e)(4)(A). App. at 20a. Because no one other than Green would have "had a hand in the public disclosure of allegations" of the present FCA lawsuit, *Wang v. FMC Corp.*, 975 F.2d 1412,

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1. All references to the underlying decision of the Court of Appeals shall be made to the Petition, Appendix A ("App.").

1418 (9th Cir. 1992), "there may be no other *qui tam* relator who could bring an action based upon the allegations made by Green." App. at 20a. Additionally, no other person could later file suit alleging the same FCA claims as being made herein. *See* 31 U.S.C. § 3730(b)(5).

Petitioners also mistakenly assert that the Court of Appeals "assumed the correctness of the district court's finding that, by entering into the release as part of the settlement of the state court action, respondent had bargained away his right to bring a *qui tam* action." Pet. at 3. Rather, for "purposes of analysis," the Court of Appeals *assumed*, pursuant to *petitioners' theory*, that the release encompassed respondent's right to bring a *qui tam* action as well as a recovery that might flow from that action. App. at 4a.

In fact, Michael Green disputed that he ever intended to release the *qui tam* action or that the release barred his ability to bring the same in both the district court and the Court of Appeals. *Id.* at 4a. Although the district court concluded that the settlement agreement included a release of Green's right to bring a *qui tam* action, the Court of Appeals never addressed that issue because it held that the respondent's right to bring a *qui tam* action could not be released as a matter of federal common law. *Id.* at 5a n.3 (*citing Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982)).

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision to bridge a "gap" in the FCA by applying federal common law to hold that a pre-filing release is not enforceable without the knowledge or consent of the United States is entirely consistent with this Court's prior decisions that a uniform federal rule of decision is necessary to protect a "uniquely federal interest" where the rights and

obligations of the United States are involved. The petition for a writ of certiorari falls well short of establishing a sufficient justification for this Court to review the Court of Appeals' decision. Petitioners rely upon authority which does not discuss the FCA and where the interests of the United States were *not* involved. Accordingly, respondent respectfully submits that the petition must be denied.

I.

THE COURT OF APPEALS' APPLICATION OF FEDERAL COMMON LAW TO THE FALSE CLAIMS ACT WAS PROPER BECAUSE THE ACT IS SILENT AS TO THE EFFECT OF PRE-FILING RELEASES.

A. The FCA Is Completely Silent As To Whether A Pre-Filing Release Without The Government's Knowledge Or Consent Is Valid.

The Court of Appeals correctly found that the "FCA is silent as to the enforceability of a pre-filing release of a *qui tam* claim." App. at 7a. Congress has decided, however, that a *qui tam* action, once filed, "may be dismissed only if the court and the Attorney General give written consent to the dismissal and the reasons for consenting." 31 U.S.C. § 3730(b)(1).

The petitioners erroneously contend that the Court of Appeals *supplemented* the detailed and comprehensive FCA statutory scheme with federal common law. Pet. at 10. However, as properly recognized by the Court of Appeals, the issue in the present case simply was *not* contemplated by Congress when it amended the *qui tam* provisions of the FCA in 1986. *See* App. at 9a ("Given the lack of any textual answer to this question or any relevant legislative history, we have no basis for inferring that Congress intended the release at issue to be enforceable or

unenforceable. Congress' silence on the matter of pre-filing releases could reflect just as reasonably its failure to contemplate the issue, its desire to leave the resolution of the issue to the courts, its approval of such pre-filing releases, or its determination that Government consent is required.").

The Court of Appeals further recognized that the issue in the present case was distinguishable from the cases relied upon by the petitioners where a statute expressly provided for a remedy or a defense and the court was reluctant to provide any additional remedy or defense.[2]

Because the False Claims Act is silent as to pre-filing releases, the analysis then turns to which law should be used to bridge this "gap." *See, e.g., Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

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2. The Court of Appeals found that the canon of statutory construction "*inclusio unius, exclusio alterius*" relied upon by the petitioners herein (*see* Pet. at 9) "simply is not relevant to the resolution of the question presented in this case. In the cases in which the canon has traditionally been applied, the question has been whether the statute at issue permits an implied right of action." App. at 8a.

This canon has been defined as "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). However, this canon "has its limits and exceptions and cannot apply when the legislative history and context are contrary to such a reading of the statute," *United States v. Castro*, 837 F.2d 441, 492-43 (11th Cir. 1988), as it is merely a rule of interpretation, and *not* a rule of law. *See Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992).

B. This Court Has Consistently Held That Where The Rights And Obligations Of The United States Are Involved, A Federal Rule Of Decision Is Necessary To Protect Uniquely Federal Interests.

Where Congress has not spoken in an area concerning federal interests, this Court has consistently held that federal courts must "fill the interstices of federal legislation 'according to their own standards.'" *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (*quoting Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). Describing the task as "difficult," *Kimbell Foods*, 440 U.S. at 727, the Supreme Court has stated that the decision whether to adopt state law or to fashion a nationwide federal rule to resolve a controversy not addressed by Congress is "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947).

Although this Court has held that matters left unaddressed in a comprehensive and detailed statutory scheme "are *presumably* left subject to disposition provided by state law," *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2054 (1994) (citations omitted) (emphasis added), this presumption is rebuttable because this Court "also has recognized a responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States...." *Northwest Airlines, Inc. v. Transport Workers' Union*, 451 U.S. 77, 95 (1981) (*citing Clearfield Trust*, 318 U.S. at 366-67; *Miree v. DeKalb County*, 433 U.S. 25, 31-32 (1977); *Standard Oil*, 332 U.S. at 316). Thus, where the rights and obligations of the United States are involved, this Court has consistently held that a federal

common law must be uniformly applied, thereby preempting the use of state law.

Application of a uniform federal common law has extended to situations involving the contractual relations of the United States, *see Clearfield Trust*, 318 U.S. at 366 (this Court held that the "rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."), as well as situations affecting the liability of the United States or the liability of entities who have contractual relations with the United States. *See, e.g., Standard Oil*, 332 U.S. at 305-06 ("The scope, nature, legal incidents and consequences of the relation between persons in [military] service and the Government are fundamentally derived from federal sources and governed by federal authority.") (citation omitted); and, *Boyle v. United Technologies Corp.*, 47 U.S. 500, 506-07 (1988) (holding that "The imposition of liability on Government contractors will directly affect the terms of Government contracts. . . . [T]he interests of the United States will be directly affected.");

The fact that federal law must be applied to govern the rights and duties of the United States finds its basis in the United States Constitution. *See* U.S. Const., art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."); *see also Clearfield Trust*, 318 U.S. at 366 ("When the United States disburses its funds or pays it debts, it is exercising a constitutional function or power.").

In the present case, it is plain that enforcement of the FCA is germane to the "rights and obligations of the United States" as it was the "objective of Congress" in passing the FCA "to protect the funds and property of the Government from fraudulent claims. . . ." *Rainwater v. United States*, 356 U.S. 590, 592 (1958); *see also United States ex rel. Marcus v. Hess*, 317 U.S.

537, 551 (1943) ("The chief purpose of [the FCA]. . .was to provide the restitution to the Government of money taken from it by fraud. . . .").[3]

The FCA is clearly related to the "uniquely federal interests" of the Government to recoup fraudulently-paid public monies. *See, e.g., Standard Oil*, 332 U.S. at 306 (holding that where "the Government's purse is affected" a sufficient basis exists "for excluding state intrusion.").[4] Where the question is "one of federal fiscal policy," it is *not* of "special or peculiar concern to the states or their citizens." *Standard Oil*, 332 U.S. at 311.

The *qui tam* provisions of the FCA are "intended to encourage those with knowledge of a fraud to come forward," *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994) (citation omitted), *cert. denied*, 115 S. Ct. 1110 (1995), and "to promote private citizen involvement in exposing fraud against the Government. . . ." *United States ex rel. Radushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir.) (citation omitted), *cert. denied*, 115 S. Ct. 2579 (1994); *see also United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir.), *cert. denied*, 114 S. Ct. 1125 (1993) ("The entire purpose of the FCA's qui tam provisions is to employ the help of individuals to uncover fraud against the Government.").

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3. This Court has further indicated that the FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government," *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *see also* S. Rep. No. 99-345, 99th Cong., 2d Sess. 9 (1986) (The Senate Report to the 1986 FCA Amendments makes clear that the Act "is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services.").

4. *See also United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93 (1973) ("when transactions of the Federal Government are involved . . . . the Constitution or Acts of Congress require otherwise than that state law governs of its own force.") (footnote omitted).

The "relationship" between the United States and a *qui tam* plaintiff is contractual: "The FCA effectively assigns the Government's claims to *qui tam* plaintiffs. . . , who then may sue based upon an injury to the federal treasury. Under this theory of standing, *the FCA's qui tam provisions operate as an enforceable unilateral contract.*" *Kelly*, 9 F.3d at 748 (emphasis added).

Because of the contractual relationship between the United States and a *qui tam* plaintiff, coupled with the underlying purpose of the FCA to recoup money paid out by the Government as a result of fraud, the *qui tam* provisions of the FCA also serve a "uniquely federal interest" of helping the United States recoup its monies paid as a result of fraud.

The identification of a "uniquely federal interest" establishes a "necessary . . . condition for the displacement of state law." *Boyle*, 487 U.S. at 407. *Boyle* indicates that displacement of state law "will occur where a significant conflict exists between an identifiable federal policy or interest in the operation of state law or the application of state law would frustrate specific objectives of federal legislation. . . ." *Id.* *Boyle* recognized, however, that the conflict between state and federal law "need not be as sharp" where Congress legislates in areas, such as the FCA, that have *not* been traditionally occupied by the states. *Id.* (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, where the "uniquely federal interest" requires a uniform rule, the entire body of state law applicable to the area conflicts and must be replaced by federal rules. *Id.* (*citing Clearfield Trust*, 318 U.S. at 366-67).

In the present case, the Court of Appeals correctly applied the factors set out in *Kimbell Foods*[5] and held that it was

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5. These factors include: (1) whether the issue requires a national uniform body of law; (2) whether the application of state law would frustrate (Cont'd)

"appropriate to fashion a uniform federal common law rule to determine the validity of [pre-filing] releases. . . ." App. at 12a.

First, the Court of Appeals recognized that "[u]pholding the release at issue in this case would frustrate the policies underlying the *qui tam* provisions of the FCA." App. at 11a.[6] Because the rights or obligations of the United States are involved in a FCA case, including matters pertaining to the public fisc, a uniform federal common law rule was necessary to displace state law.[7]

(Cont'd)
specific objectives of the federal program; and (3) whether application of a federal rule would disrupt commercial relationships predicated on state law. App. at 10a-11a (*quoting Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458 (9th Cir. 1986) (*quoting Kimbell Foods*, 440 U.S. at 728-29)).

6. The Court of Appeals also recognized that *O'Melveny* did not purport to overrule this Court's decision in *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952), which held that federal rights easily could be defeated if federal law did not ultimately control the question of the validity of a release. App. at 9a-10a n. 4 (*citing Dice*, 342 U.S. at 361).

7. *See, e.g., Clearfield Trust*, 318 U.S. at 367 ("The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of law rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great perversity and results by making identical transactions subject to the vagaries of the laws of the several states. *The desirability of a uniform rule is plain.*") (emphasis added); *see also Standard Oil*, 332 U.S. at 310-311 (The Government's right to be indemnified for injury to military service personnel by third parties affects the ability "to make whole the federal treasury for financial losses sustained. . . . [a]nd because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition . . . they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.").

Second, the Court of Appeals also determined that application of state law in the present case would frustrate the specific objectives of the FCA. App. at 11a. Specifically, the Court of Appeals determined that there was a "distinct possibility" that a state would unduly emphasize the interest favoring enforceable releases over the interests of the United States. *See id.* (citation omitted). Additionally, the Court of Appeals felt that it was necessary to apply a uniform federal rule "to prevent parties, through use of choice-of-law clauses, from selecting as governing law the law of the state that is most likely to uphold the release." *Id.* (*citing Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340 (9th Cir. 1992) (which held that a settlement agreement purporting to waive a federal securities claim is governed by federal law even when it contains a choice-of-law claim because "federal statutory rights could be easily defeated if state law could be used to control the incentives of those rights and the defenses of them." (internal quotation omitted)).

Lastly, the Court of Appeals held that "applying a uniform federal rule will not disrupt commercial relationships that are predicated on state law." *Id.* In fact, the Court of Appeals flatly rejected petitioners' argument below that a government contractor like Northrop will not be able to fully settle employee-related disputes. *Id.* at 23a-24a.

Thus, the Court of Appeals correctly determined that application of a uniform federal common law was justified in light of the underlying legislative policy of the *qui tam* provisions of the FCA and the "uniquely federal interests" of the United States embodied therein.[8]

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8. The petitioners do not assert herein that the Court of Appeals erred in applying the "balancing test" of the federal common law rule set forth in *Town of Newton v. Rumery*, 480 U.S. 386 (1987) that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.*, 480 U.S. at 392 (citations and footnote omitted).

II.

THE AUTHORITY RELIED UPON BY PETITIONERS IS READILY DISTINGUISHABLE FROM THIS FCA CASE.

A. Petitioners' Brief Fails To Cite To Any Applicable Authority Interpreting the False Claims Act.

Respondents respectfully submit that certiorari must be denied because the petitioners have simply misapplied this Court's relevant authority to determine whether or not the Court of Appeals correctly fashioned a uniform federal common law holding that a pre-filing release of a FCA claim is unenforceable without the United States' knowledge or consent. Perhaps the most telling factor is the conspicuous omission by the petitioners of *any case authority discussing the FCA*, save for one isolated case.[9] The nonexistent reliance upon FCA case authority manifestly demonstrates that the cases upon which petitioners rely are readily distinguishable from the present case.

B. *O'Melveny* Does Not Require Reversal Of The Court of Appeals' Decision.

Moreover, the Supreme Court authority relied upon by the petitioners do not serve as a basis for reversing the Court of Appeals' well-founded and careful decision rendered in this case. The prime example of this fact is petitioners' overstated and misguided reliance on *O'Melveny*.

In *O'Melveny*, the Federal Deposit Insurance Corporation

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9. Petitioners' citation to *Mortgages, Inc. v. United States District Court*, 934 F.2d 209 (9th Cir. 1991), was for the sole purpose of indicating that the FCA is a detailed and comprehensive federal scheme, which the Court of Appeals in this action so found. App. at 10 n. 3.

("FDIC"), as receiver for a failed savings and loan ("S&L"), sued the S&L's former counsel for state law claims of legal malpractice and breach of fiduciary duty. The law firm successfully moved for summary judgment contending that the FDIC was estopped from filing suit because the FDIC "stood in the shoes" of the S&L to whom the wrongdoing of S&L insiders was attributable. This Court ultimately vindicated the district court's ruling, and reversed the court of appeals, by holding that the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) created federal rules "regarding claims by, and defenses against, the FDIC, as receiver. . . ," and, as a result, federal common law could not be invoked to create an exception to the defenses against the FDIC as listed in FIRREA. *O'Melveny*, 114 S. Ct. at 2053-54.

However, *O'Melveny* recognized that the creation of a federal common law rule *is warranted* in situations where Congress has not acted and "there is a 'significant conflict between some federal policy or interest in the use of state law'" *Id.*, 114 S. Ct. at 2055 (*quoting Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Assuming FIRREA was inapplicable, *O'Melveny* decided that the FDIC had not identified any "significant conflict with an identifiable federal policy or interest" or that the "primary conduct of the United States or its agents or contractors" was involved sufficient to displace state law, because the FDIC's rights and liabilities were only as a receiver to the failed S&L. *Id.*

What distinguishes the present case from *O'Melveny* is that, here, a contract *exists* between the United States and the *qui tam* plaintiff, *see Kelly*, 9 F.3d at 748, such as to invoke the rights and obligations of the United States and, thereby, require uniform application of a federal common law where Congress has not expressly acted. *See Boyle*, 47 U.S. at 504-05 ("We have held that obligations to and rights of the United States under its

contracts are governed exclusively by federal law.") (citations omitted)).

The other Supreme Court cases relied upon by the petitioners either involve situations where this Court was reluctant to include an implied remedy or defense where Congress had already provided an explicit remedy or defense[10] or, where Congress was silent on the matter, state law could be applied because there was neither a significant conflict between state and federal law or there was no need for a uniform body of federal common law.[11]

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10. *See, e.g., O'Melveny*, 114 S. Ct. at 2054; *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981) (the Court refused to supplement the remedies provided for in the federal antitrust laws with a claim for contribution); *Northwest Airlines*, 451 U.S. at 93 ("The comprehensive character of the remedial scheme[s] expressly fashioned by Congress [under the Equal Pay Act and Title VII] strongly evidences an intent not to authorize additional remedies" including a claim for contribution) (footnote and citations omitted); *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1973) (Court held that federal common law could not impose more stringent effluent standards than those set forth in the Federal Water Pollution Act Amendments); and, *Mobil Oil*, 436 U.S. at 625 (the Court refused to supplement the remedies provided for by The Death On The High Seas Act with a claim for loss of society).

11. *See, e.g., Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98-99 (1991) (the Court held that because corporations are "creatures of state law," "[t]he presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that the rights and obligations would be governed by state-law standards.") (citations omitted); and *Kimbell Foods*, 440 U.S. at 729-30 (holding that a uniform national rule was unnecessary to protect the federal interests underlying the Small Business Administration and the FHA loan programs because the SBA operations were "specifically and in great detail adapted to state law," and that the "federal interest in supplanting important and carefully evolved state arrangements designed to serve multiple purposes was minimal.") (internal quotations and citation omitted).

C. Congress Has Manifested Its Intent That A *Qui Tam* Plaintiff and Defendant Cannot Settle or Dismiss a FCA Claim Without The United States' Consent.

Perhaps recognizing that the Court of Appeals' decision to apply federal common law in the present case was consistent with applicable Supreme Court authority, the petitioners next make the unsupportable contention that the Court of Appeals' decision nevertheless conflicts with the recent opinion of this Court in *United States v. Mezzanatto*, 115 S. Ct. 797 (1995). *See* Pet. at 15-16.

In *Mezzanatto*, this Court held that a criminal defendant's agreement to waive the exclusionary provisions of plea-statement rules set forth at Federal Rules of Evidence 410 and Federal Rules of Criminal Procedure 11(e)(6) were presumably subject to waiver "absent some affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 115 S. Ct. at 801. This was especially so in *Mezzanatto* because "[a]bsent some 'overriding procedural consideration that prevents enforcement of the contract,' courts have held that agreements to waive evidentiary rules are generally enforceable even over a party's subsequent objection." *Id.*, 115 S. Ct at 802 (citation omitted).

Here, however, the only indication of the legislative intent of Congress concerning the ability of the *qui tam* plaintiff and the defendant to settle is that they cannot agree to settle or dismiss a pending FCA claim unless "the court and the Attorney General give written consent to the dismissal and the reasons for consenting." 31 U.S.C. § 3730(b)(1). Because of this express provision, the Court of Appeals opined that, "It may be more consistent with the enforcement scheme set up by Congress to prevent parties from releasing the [FCA] remedy without first

obtaining the government's consent." App. at 8a.[12]

Because the FCA evidences Congress' intent that the United States' must approve the settlement or dismissal of a pending FCA claim, the present case is distinguishable from the circumstances in *Mezzanatto*, where no congressional intent was present.

D. No Conflicts Exist Between The Court Of Appeals' Decision And The Decision of Other Courts.

The petitioners also attempt to manufacture a purported appearance of conflict between the Court of Appeals' opinion herein and decisions from other circuits. Again, however, the glaring weakness of petitioners' argument is that *none* of the cases from the other circuits remotely concern the FCA. *See* Pet. at 12-15, 27-28.

In order to invoke the jurisdiction of this Court, the petitioners were required to affirmatively establish that the Court of Appeals in this case "entered a decision in conflict with the decision of another United States court of appeals *on the same important matter...*" Sup. Ct. R. 10(a) (emphasis added). Instead, as noted above, the Court of Appeals' decision to apply a uniform federal common law to pre-filing releases under the FCA is entirely consistent with this Court's precedent. Thus, no conflict exists between the Court of Appeals' decision in this

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12. Moreover, *Mezzanatto* did not purport to overrule this Court's earlier decision in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), which held that certain statutory entitlements guaranteed to employees by the Fair Labor Standards Act were not subject to waiver because the structure and legislative history of the Act evinced a "legislative policy" of "prevent[ing] private contracts" on such matters. *Id.*, 324 U.S. at 706.

case and cases from other Court of Appeals as cited by the petitioners.[13]

E. Principles Of *Res Judicata* Do Not Bar This FCA Claim.

Lastly, this Court should not grant certiorari on petitioners' tortured contention that *Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873 (1996), provides an "alternative basis" for concluding that the Court of Appeals erred in this case. Pet. at 25 n. 12. Petitioners' reliance on *Matsushita* is simply misplaced because if the release of the FCA claim was unenforceable in the first place — as decided by the Court of Appeals — the state court could not have dismissed this claim. Moreover, Northrop has failed to demonstrate that a "judgment" was actually entered in the state court action herein; rather, Green agreed to voluntarily dismiss his state law claim for wrongful termination after consummating the settlement with petitioner Northrop.

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13. Likewise, this Court's jurisdiction should not be invoked for the argument set forth by the petitioners that "[m]ore generally, this case provides an appropriate vehicle for providing much needed guidance on the broader question 'whether state law should be adopted as the federal rule of decision to govern the enforceability of settlement agreements' that cover federal claims...." Pet. at 28. Again, none of the cases cited at page 28 of the petition remotely involve cases interpreting the FCA. Thus, pursuant to Rule 10 of this Court, there does not exist a conflict concerning the "same important matter." Sup. Ct. R. 10(a).

CONCLUSION

Based on the foregoing, respondent respectfully prays that the petition for writ of certiorari must be denied.

Dated: May 24, 1996

Respectfully submitted,

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